

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 24, 2008

IN RE: J. D. P. AND J. L. J.

**Appeal from the Juvenile Court for Maury County
No. 1085J J. Lee Bailey, III, Judge**

No. M2007-02695-COA-R3-PT - Filed June 30, 2008

Father appeals the termination of his parental rights to his two minor children, J.L.J. and J.D.P. The trial court terminated his rights on the grounds of substantial non-compliance with the permanency plan and the existence of persistent conditions. The trial court also found that the termination of Father's parental rights was in the children's best interest. We affirm the trial court's termination of parental rights based upon Father's substantial non-compliance with the permanency plans and the fact that termination of his parental rights is in the children's best interest.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and RICHARD H. DINKINS, J., joined.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant A. L. J., Jr.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, for the Tennessee Department of Children's Services.

OPINION

The two children who are the subject of these proceedings, J.L.J. and J.D.P., were born in November of 2004 and December of 2005, respectively. Both children were born with drugs in their system, and the children lived in squalid conditions with their mother and maternal grandmother until they were taken into state custody in April of 2006.¹

A preliminary hearing was held in May of 2006, following which the Juvenile Court of Maury County adjudicated the children dependent and neglected and granted custody to the Department of Children's Services. The children were then placed in foster care and have remained in foster care with the same family ever since.

¹When the State took custody of the children, the younger child had to be hospitalized for a respiratory infection related to his asthma, which was aggravated by exposed logs in the home from which he was removed.

On May 9, 2006, the Department met with both parents to develop the initial permanency plans, the goals of which were to reunify the children with the parents or have them live with relatives. The plan for Father required that he participate in domestic violence counseling; secure safe and stable housing that is allergen free and that has electricity and running water; obtain a legal source of income; and participate in a mental health intake and follow the recommendations. Father signed the permanency plan, and the trial court approved the plan.²

By April of 2007, both parents had made little progress toward reunification under the original plans. Accordingly, the Department proposed a revised set of permanency plans, whereby the Department modified the goals to reunification and, alternatively, adoption. The revised plans, now directed at the parents individually as opposed to collectively due to the fact the parents were no longer romantically involved, retained the requirements from the previous plans and added the requirement that Father resolve his legal issues and not incur any new ones.³ The revised plans were approved by the court; however, the Department believed that little progress was made by either parent in the following weeks. As a consequence, on July 6, 2007, the Department filed its Petition to terminate the parental rights of Father and Mother. The Department petitioned on the grounds of abandonment for the willful failure to pay child support, substantial non-compliance with the permanency plan, and persistent conditions.

The case was tried on October 16, 2007. Both parents and their respective counsel were in attendance and participated at trial. Thereafter, by order entered on October 31, 2007, the Juvenile Court terminated the parental rights of both parents. As for Father, the court found that Father had failed to remedy persistent conditions that led to the children's removal and failed to substantially comply with the permanency plans.⁴ Furthermore, the trial court found that the termination of both parents' rights was in the best interests of the children. This appeal by Father followed. The children's mother, however, did not appeal the termination of her parental rights.

Father appeals, contending, *inter alia*, there is insufficient evidence of Father's substantial non-compliance with the permanency plans and insufficient evidence that the termination was in the children's best interest.

²The plans for the mother were substantially similar except she was not required to participate in domestic violence counseling.

³Father refused to sign the plans due to the fact he objected to the alternative goal of adoption.

⁴The court also terminated Father's rights based on the ground that he willfully failed to pay child support, which finding Father challenges on appeal. The Department conceded the issue in its brief stating, "[g]iven [Father]'s undisputed testimony that he was instructed by a court not to pay child support until resolution of the termination proceedings, it does not appear that the Juvenile Court's termination pursuant to this ground was based on clear and convincing evidence." We therefore reverse the juvenile court's determination that Father's parental rights should be terminated on the ground that he willfully failed to pay child support.

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence. See *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child). Therefore, a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Whether a statutory ground has been proved by the requisite standard of evidence is a question of law to be reviewed *de novo* with no presumption of correctness. *In re B.T.*, No. M2007-01607-COA-R3-PT, 2008 WL 276012, at *2 (Tenn. Ct. App. Jan. 31, 2008) (no Tenn. R. App. P. 11 application filed) (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

ANALYSIS

Parental rights are among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions. *In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 WL 1085545, at *2 (Tenn. Ct. App. April 26, 2006) (citing *Troxel v. Granville*, 530 U.S. 57 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001)). Parental rights are not, however, absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004).

In Tennessee, termination proceedings are governed by statute. Tenn. Code Ann. § 36-1-113; see *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Termination of parental rights must be based upon a finding by the court that (1) a ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones*, 92 S.W.3d at 838; and (2) termination of the parent's rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

Substantial Non-Compliance with the Permanency Plans

One of the statutory grounds upon which the Department relies in this appeal is that Father was in substantial noncompliance with the statement of his responsibilities in the permanency plans. *See* Tenn. Code Ann. § 36-1-113(g)(2). The Juvenile Court concluded that Father had failed to substantially comply with the permanency plans. Father contends the record does not contain clear and convincing evidence to support the trial court's finding. We find no merit in this contention.

The issue of substantial noncompliance with the requirements of a permanency plan is a question of law; therefore, it is reviewed *de novo* with no presumption of correctness. *In re Valentine*, 79 S.W.3d at 546 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002)).

Father's parenting plans required him to do the following: (1) provide a safe, stable, secure home environment for himself and his children, (2) obtain legal income to provide for himself and his children, (3) attend and participate in a mental health intake and follow all recommendations, (4) complete domestic violence classes through in-home services, and (5) resolve any legal issues and refrain from obtaining additional criminal charges. With regard to the children's living environment, Father was required to obtain safe, stable housing with electricity and running water. Further, due to severe respiratory problems of one of the children, Father was also required to maintain a home with a healthy environment.⁵

The Juvenile Court determined that the Department proved by clear and convincing evidence that Father failed to substantially comply with the requirements of the permanency plan. In reaching this decision, the court focused on Father's unstable housing situation, his failure to obtain employment, and his recent criminal charges.

By his own admissions at trial, Father had lived in three locations in the year prior to the trial, including a motel in Columbia, Tennessee, a trailer park in Mount Pleasant, and in his mother's home. More significantly, the record also reveals that Father was incarcerated in the Maury County Jail at the time of trial. Based on these facts, the court determined that Father had failed to demonstrate that he was able to provide the required housing on a long-term basis.

⁵The plan required Father to maintain an "allergen-free" home. We doubt the goal of maintaining an "allergen-free" home is attainable by anyone. Nevertheless, whether the home was "allergen-free" is irrelevant to this appeal.

With regard to his employment pursuits, the trial court found it significant that Father had not had a steady job in the prior eighteen months. Father testified that in the past year, he had only four months of employment. Prior to that time, he had worked for several months at an aluminum plant but was terminated. At the time of trial, Father was in jail and did not have a job, and he provided no assurances to the court about future employment.

To add insult to injury, in September of 2007, one month prior to trial, Father pled guilty to three criminal offenses: felony evading arrest, driving under the influence, and reckless endangerment, for which he was sentenced to two years in the Tennessee Department of Correction.⁶ The Juvenile Court found this to be a substantial violation of the permanency plan requirement that Father not incur any new criminal charges.

Based upon the foregoing, we have concluded that the record contains clear and convincing evidence that Father failed to substantially comply with the permanency plans. Accordingly, we affirm the Juvenile Court's determination that the Department has proven one of the statutory grounds for termination of Father's parental rights.

Other Statutory Grounds for Termination

Termination of parental rights may be based upon a finding that one statutory ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d at 367; *Jones*, 92 S.W.3d at 838; and that termination of the parent's rights is in the child's best interests. Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622. We have determined that the Department proved one of the statutory grounds for termination of Father's parental rights. Therefore, we need not consider whether the Department proved any other statutory grounds and shall proceed to determine whether the Department proved that termination of Father's parental rights is in the children's best interests. *See In re D.L.B.*, 118 S.W.3d at 367.

Best Interests

In addition to proving one of the grounds for termination, the Department must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d at 544; *In re C.W.W.*, 37 S.W.3d at 475-76. Having concluded that the Department established a ground for termination, we next turn our attention to whether the termination of Father's rights was in the best interest of the children. *See Tenn.Code Ann. § 36-1-113(c)(2).*

Section 36-1-113(i) of the Tennessee Code Annotated provides that in determining whether termination of parental rights is in the best interests of the child, the court shall consider, but is not limited to, the following:

⁶ All but sixty days of the sentence was suspended, and he was to remain on probation for the balance of the two-year sentence.

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5- 101.

Tenn. Code Ann. § 36-1-113(i). The foregoing list is not exhaustive, and the statute does not require that every factor appear before a court can find that termination is in the child's best interests. *State v. L.H.*, No. M2007-00170-COA-R3-PT, 2007 WL 2471500, at *7 (Tenn. Ct. App. Aug. 31, 2007) (perm. app. denied Dec. 3, 2007) (citations omitted).

The trial court found that the Department proved by clear and convincing evidence that it was in the children's best interests to terminate Father's parental rights based upon the following findings:

- Father has not made changes in his conduct or circumstances that would make it safe for the children to go home.

- Father has not made lasting changes in his lifestyle and lasting change does not appear possible.
- Changing caregivers at this stage in the children's lives will have a detrimental effect on them.
- The children have established a strong bond with their foster parent, and she has stated that she wishes to adopt them.
- The foster parent has shown more interest in the children than Father has.
- Both children are happy and thriving with their foster parent and permanency in a stable home is in the children's best interest.
- The Guardian ad litem believes it is in the best interest of the children to terminate Father's parental rights.

The record reveals that the children have been living in a caring and loving home for a year and a half at the time of the trial, and their foster mother wishes to adopt them. Their foster mother testified that she was aware of the youngest child's respiratory issues and had taken him to numerous doctor's visits, administered breathing treatments and medication, and kept her home free of smoke, pets, and allergens that could harm the child. When the children first came into custody, their foster mother went to the youngest child's daycare center to administer breathing treatments, but as of the date of trial, the child had improved to the point of no longer requiring the breathing treatments. Conversely, Father has never cared for or provided for the children, and there is no basis upon which to conclude that he ever will be able to do so. Moreover, the parental rights of the children's mother have been terminated.

The best interests of the child are to be determined from the perspective of the child rather than the parent. *See L.H.*, 2007 WL 2471500, at *7 (citing *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004)). Viewing all the evidence from the children's perspective, the record clearly and convincingly establishes that it is in the children's best interests that Father's parental rights be terminated.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Department of Children's Services due to Father's indigency.

FRANK G. CLEMENT, JR., JUDGE